PUBLIC PROSECUTOR

v.

SAINAL ABIDIN MADING

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[CRIMINAL TRIAL NO: 47-03 OF 1997]
5 DECEMBER 1997

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Standard of proof to be applied - Maximum evaluation - Prima facie case*

CRIMINAL LAW: *Penal Code - Section 300 - Murder - Ingredients - Penal Code, s. 300*

CRIMINAL LAW: *Penal Code - Section 300 - Murder - Defences - Penal Code, s. 300 - Exceptions - Private defence - Sudden fight*

The accused was charged with the murder of one Isnidil Rasin ('the deceased') under s. 300 of the Penal Code and punishable under s. 302 thereof. The evidence called by the prosecution showed that the deceased had been killed at his place of work. Eyewitness accounts put the deceased at work in a wood veneer factory, during which the deceased was hit in the face by some veneer pulled off a machine by the accused. The witnesses said the deceased apparently asked the accused if the accused was angry, to which the accused did not reply. They said no fight took place. Some moments later, the accused attacked the deceased with a sharp metal bar, inflicting two stabs wounds to his heart and one to his lung, each one fatal. The deceased was pronounced dead on arrival at the hospital.

The defence argued that there was no intention to cause death within the meaning of s. 300 and relied on Exceptions 2 and 4 of the section, namely private defence and sudden fight. The accused alleged that the deceased had uttered foul language to him after the deceased had been hit in the face by the veneer and had initiated a fight by hitting and kicking the accused. He said that he had not intended to stab the deceased in the heart and lung, although he admitted knowing that such wounds would cause death.

Held:

[1] The evidence of the coroner showed that the stab wounds were sufficient in the ordinary course of events to cause death within ten minutes and that they were inflicted by a sharp object through the application of substantial force. The coroner's qualifications and expertise to give such evidence were not challenged by the defence. The court therefore found him duly qualified and accepted his evidence.

[2] The eyewitness accounts and forensic evidence showed that the deceased died from the wounds inflicted by the accused and that the weapon used was the metal bar. These facts, coupled with the deliberate nature of the accused's action in stabbing the deceased, gave rise to a *prima facie* case upon a maximum evaluation of the evidence at the close of the prosecution case.

[3] The state of mind of the accused had to be ascertained with regard to the surrounding circumstances, including the nature and number of the wounds inflicted, the part of the body affected and the weapon used. Although there was no apparent motive for the attack, it was not an essential ingredient of the offence. The accused admitted holding the metal bar prior to the attack and that he knew it had a sharp end. He had landed not one but three fatal blows to the deceased's chest. These established beyond reasonable doubt that the accused had the intention of causing the bodily injuries which were sufficient in the ordinary course of nature to cause death.

[4] Having considered the two conflicting accounts of what transpired before the stabbing, the court had no hesitation in rejecting the accused's version. As such, the defence of private defence failed.

[5] There was no evidence of any fight or quarrel taking place before the stabbing. Furthermore, for Exception 4 to apply, there must not have been any taking of undue advantage or cruel and unusual actions by the accused. In this case, the repeated stabbing reflected that the accused had taken undue advantage or acted in a cruel or unusual manner. Therefore, the defence of sudden fight also failed.

Obiter

[1] Even if provocation had been relied on, which in this case it was not, the accused had denied being angry when the deceased allegedly used foul language on him. As such, provocation would also not have been a defence.

[Accused convicted of murder.]

Cases referred to:
Liew Kaling & Ors v. Public Prosecutor [1960] 26 MLJ 306 ***(refd)***
Public Prosecutor v. Lin Lian Chen [1990] 2 CLJ 1020 ***(foll)***
Rajinder Kumar & Anor v. State of Punjab [1966] Cri LJ 960 ***(refd)***
Tan Buck Tee v. Public Prosecutor [1961] 27 MLJ 176 ***(foll)***
Tham Kai Yau & Ors v. Public Prosecutor [1977] 1 MLJ 174 ***(refd)***

Legislation referred to:
Penal Code, ss. 299, 300, 302, 304

For the prosecution - Zahir Hussein Ahmad Shah DPP
For the accused - Francis Wong; M/s Peter Lo & Co

Reported by Anne Khoo

JUDGMENT

Richard Malanjum J:

The Charge

The charge preferred against the accused reads as follows:

CHARGE

To the abovenamed Accused person.

You are charged at the instance of the Public Prosecutor, Malaysia and the charge against you is as follows:-

That you, on the 5th day of July, 1997 at about 4.00 p.m. at Capital Veneers & Plywood Sdn. Bhd., a factory located at Mile 9, Jalan Labuk, in the District of Sandakan, in the State of Sabah, did commit murder by causing the death of one ISNIDIL B. RASIN, 25 years old male, and you have thereby committed an offence punishable under Section 302 of the Penal Code (F.M.S. Cap 45).

Dated this 6th day of November, 1997.

Burden Of Proof

To secure a conviction on the charge preferred the burden of proof remains with the prosecution throughout. The standard of proof required is beyond reasonable doubt. There is no similar burden on the accused. He is presumed innocent until proven guilty. And in order to avoid a conviction on the charge preferred the accused is only required to introduce a reasonable doubt in the prosecution case. His version may not necessarily be true. But if it succeed in creating a reasonable doubt in the prosecution case, that is sufficient to defeat the charge preferred.

The Ingredients Of The Charge Preferred

The onus is upon the prosecution to establish beyond reasonable doubt the following ingredients, namely:

(1) That Isnidil bin Rasin is dead;

(2) That Isnidil bin Rasin died as a result of injuries sustained by him;

(3) That the injuries of Isnidil bin Rasin were caused or the result of the act of the accused; and

(4) That in inflicting the injuries upon Isnidil bin Rasin the accused either:

(a) caused them with the intention of causing death; or

(b) caused them with the intention of causing such bodily injuries as the accused knew to be likely to cause the death; or

(c) caused them with intention of causing bodily injuries and such bodily injuries intended and inflicted were sufficient in the ordinary course of nature to cause death.

The Prosecution Case

(i) Ingredients 1 and 2

It is the prosecution case that at about 4.30pm on 5 July 1997 a dead body arrived at the Duchess of Kent, Hospital Sandakan. It was later identified by the father of the dead person as that of Isnidil bin Rasin. And PW3, Dr. Mohd. Khalid Yusof testified that he conducted a post-mortem on the body upon the request of the police on 7 July 1997 from about 11.25am. PW3 said that he recorded his findings and later on prepared a post-mortem report. That post-mortem report was tendered and admitted as exh. P27 in this trial without any objection from the defence. And it may be appropriate here to reproduce the relevant parts of exh. P27, namely:

REPORT OF POST MORTEM EXAMINATION

…

...

HISTORY

Brought in dead by his friends (Aisah Abdullah) at 4.30 p.m. on 05/07/97. Alleged was found lying down on the floor at working place (Capital Vineer) with stab wound on left chest and left upper arm and two stab wounds on right chest.

…

…

MARKS OF VIOLENCE OR TRAUMA

- stab wound at left chest, about the breadth of 3 cm. at the side of the heart.
- stab wound at left upper arm.
- two stab wounds at right side of chest.

THORAX

…

…

PLEURAL CAVITIES : Two penetrating wounds on right pl. cavity

…

…

LUNGS

RIGHT : Right lung having two penetrating wounds

…

…

HEART

PERICARDIUM : Penetrating wound on pericardium and ventricle

…

…

SUMMARY OF CASE

Brought in dead by his friends (Aisah Abdullah) at 4.30 p.m. on 05/07/97.

He was found lying down on the floor at working place (Capital Vineer) with stab wound on left chest and left upper arm and two stab wounds on right chest.

On autopsy there was haemothorax and penetrating wound in ventricle of heart and two penetrating wound in right lung.

CAUSE OF DEATH

1 a: Stab wound in the ventricle of heart causing haemothorax.

1 b: Two stab wounds on right lung.

According to PW3, he found the following injuries on the dead person, Isnidil bin Rasin ("the deceased"), namely:

(i) one stab wound at the left side of the chest. It was about 3 cm in width on entry and about 7 cm in depth. It penetrated into the left ventricle of the heart;

(ii) two wounds at the right side of the chest. They were also about 3 cm in width and 7 cm in depth. Both penetrated into the right lung; and

(iii) one wound on the left upper arm. It was a slashed wound of about 3 cm in width and 1 cm in depth.

It was also the evidence of PW3 that the wound under (i) above would cause a lot of blood to gush out. And he explained that the ventricle is the lower part of the heart which pumps blood to the whole of the body. According to PW3 a wound as such is sufficient in the ordinary course of nature to cause death.

As for the wounds under (ii) above, PW3 said that in order to penetrate into the lung the wounds had to penetrate the skin, the sub-coetaneous tissue, the muscles, the ribs and the pleura over the lung before the lung itself. PW3 further said that such wounds resulted in a lot of blood gushing out and in the ordinary course of nature they would be sufficient to cause death.

PW3 also testified that if a person suffers the three wounds as found by him on the deceased, it would take not more than 10 minutes for the person to die. And in this case PW3 said that the injuries suffered by the deceased had caused his heart and the right lung to stop functioning. The conclusion of PW3 on the cause of death of the deceased was due to the stab wounds, one on

the left side of the chest which caused damage to the heart and two on the right side of the chest penetrating into the lung. PW3 found no natural cause or disease which contributed to the death of the deceased. He also found no sign of strangulation or bruises on the deceased. Finally, in reply to a question PW3 said that such wounds as sustained by the deceased could have been caused by a sharp dagger, knife or object with substantial force applied. And when shown exh. P16, (a piece of iron with one end sharp) PW3 said that in his professional medical opinion the object could have caused the injuries found on the deceased. He said so due to the width of the object and the length of more than 7 cm with a sharp tip.

This witness was also shown exh. P23, a glass bottle containing blood sample. He confirmed he took the sample blood from the body of the deceased and gave it to one ASP Said Noor.

Now, I have no reason to reject summarily the testimony of PW3 as a medical doctor and thus an expert although it was his first appearance in court to give evidence. He gave his medical qualification, being a graduate with MBBS from the Dow Medical College, Pakistan. PW3 said that Pathology was part of his medical study. And before coming to work with the Duchess of Kent Hospital, Sandakan, PW3 worked in a Police Hospital in Pakistan. Prior to 7 July 1997 PW3 said that he had done one or two post-mortems. Hence, I should therefore consider the evidence of PW3 as I find him duly qualified to give such evidence. In addition I find no challenge from the defence as to his qualification or expertise.

As regards his evidence on the death of the deceased I find it credible, more so with exh. P27 tendered with no objection from the defence. In fact at least two other witnesses called by the prosecution who confirmed the death of Isnidil bin Rasin. They are PW7 Aisah bte. Dullah and PW8 Rasin bin Itu. PW7 sent the deceased to the hospital. She testified that on the way the deceased stopped breathing. And PW8 is the father of the deceased. He confirmed that he saw the body of his son before the post-mortem. PW8 also said that his son, the deceased, died on 5 July 1997.

Accordingly, I found that the prosecution had *prima facie* proved ingredient 1 at the close of its case.

The evidence of PW3 also confirmed that the deceased died due to the injuries sustained by him. In particular from exh. P27 and the evidence of PW3 the fatal wounds were those found on the chest of the deceased. One wound penetrated the left ventricle of the heart whilst another two penetrated into the right lung. PW3 testified that such injuries would cause death of a person in not more than 10 minutes. And PW3 found no intervening cause of death other than the three injuries.

As such in respect of ingredient 2 I found that the prosecution at the close of its case had also *prima facie* proved that the injuries sustained by the deceased caused his death.

(ii) Ingredient 3

To establish this ingredient the prosecution called several witnesses including a chemist and two eye-witnesses.

It is the prosecution case that on 5 July 1997 at about 4pm the accused came down quickly from where he was working and proceeded to stab the deceased. The accused stabbed the front part of the deceased's body several times and did so once even after the deceased had collapsed.

The evidence of PW4, Samiah bte. Tukiman, disclosed that on 5 July 1997 she was working as a labourer in the factory of Capital Veneer and Plywood Sdn. Bhd. She said that she was in the "Roteri" section of the factory together with other workers, namely, Maimunah, Seharan, Abdal, the deceased and the accused who was the operator. This witness identified the accused in court. According to PW4 there were two other workers but she could not remember who they were. PW4 went on to outline the duties on that day for each of the workers she mentioned. Besides the accused PW4 said that the other operator was Abdal whilst the four of them were responsible for affixing tapes on the veneers in order to prevent them from breaking when rolled. PW4 also said that the deceased and Seharan had the additional duty of receiving the excess cuttings of the veneers when they rolled on the machine.

And this witness also described the working environment in the factory on that day. She said that the accused and Abdal were working on a higher level but she could see them and *vice-versa*. And if they talked loudly she could hear them. Similarly they could also hear her if she talked loudly. That time she said the machines in the factory were noisy. PW4 then proceeded to mark on exh. P26(f) (a photograph of the work area) the approximate work locations of the respective workers. She also said that there was no knife in the area where she and the three others were working. According to her veneer knives were behind the machine in her section.

Next, PW4 proceeded to give an account of what happened at her place of work on 5 July 1997 at about 4pm. This witness testified that at that time she had just finished her prayer. While she was away Seharan took her place. There were therefore five of them working with Abdal taking his break. Then she heard the accused shouting from his location probably to Maimunah. According to PW4 the accused was shouting "koyak, koyak" an instruction to tear the spoilt veneer. But Maimunah replied "nanti dulu". That prompted

the accused to go down and tore the piece himself. At that moment PW4 said that she was already at her own location. Maimunah was in her own location as well with the deceased beside her.

When the accused tore the spoilt piece PW4 said that part of it hit the deceased and that made the deceased angry. And according to PW4 the deceased therefore asked the accused "kau marah kah". However the accused kept quiet and went back to his place of work. Thereafter he went behind the machine. The deceased meanwhile kept on talking.

When the accused heard the deceased continuing talking, PW4 said that he came down quickly from his place of work and approached the deceased. Thereafter the accused stabbed the deceased at the front part of his body.

PW4 could not say how many times. As she was scared, PW4 said that she ran away from the area shouting. She went to the clipper section from where she saw the accused holding what she described as a knife and going back first to his place of work before going down towards the back of the factory. When PW4 was asked to describe the object used, she said that it looked like exh. P16.

In answer to some other questions PW4 said that when the accused came down and approached the deceased she did not see him holding anything. And when the deceased was stabbed he was not holding anything either. PW4 also saw no struggle between the two during the stabbing. As for the object used, PW4 stated that it could only be found in the working area of the accused. It is used for cutting the edge of veneers. This witness also identified exh. P9 (a grey shirt) and exh. P12 (a pair of jeans) as the clothing worn by the accused on that day.

Under cross-examination PW4 said that the deceased started asking the accused after the former was hit by the spoilt veneer torn by the accused. But PW4 said that she did not hear the deceased uttering any foul language to the accused. She also said that she did not see the accused being hit on the back by the deceased. This witness also denied the suggestion that the deceased went to the place of work of the accused. According to her the deceased remained standing beside Maimunah. And PW4 only heard the deceased shouting to the accused "Kau marah kah". Although the deceased also said something else PW4 said that he was not in a shouting mode. When it was suggested that there was a fight, PW4, without hesitation, said that there was none. To another question PW4 agreed that after the accused had torn the spoilt veneer, he first went back to his place of work before going to the back of the machine to sharpen the long knife.

a And in reply to a question under re-examination PW4 said that she never saw the deceased and the accused quarrelling before the incident.

The next eye-witness was PW5, Maimunah bte. Butunga. She testified that on 5 July 1997 she was working in the "Roteri" section of the factory belonging to Capital Veneers and Plywood Sdn. Bhd. Her work was to affix *b* tapes on the veneers. Her co'workers were Saminah (PW4), Abdal, the deceased, Seharan and Sainal. She said that Sainal and Abdal were working upstairs. When asked whether she could identify Sainal, PW5 pointed the accused sitting in the dock.

c This witness then proceeded to describe what happened on 5 July 1997 at 4pm. She said that all of them were working except Abdal who went to rest. That day PW5 said that the good veneers were mixing with the spoilt ones. When that happened the accused shouted "koyak". But she replied "nanti dulu". That according to PW5 did not stop the accused from coming down to tear the *d* spoilt veneer. But as he did it, PW5 said that the torn veneer hit the face of the deceased. That prompted the deceased to ask the accused, "Kau marah kah". The accused meanwhile went back to his place of work. PW5 said that the deceased then shouted "Kau marah kah, kalau marah kasi tahu". There was no response from the accused. About three minutes later the accused came down. PW5 said that she did not see him holding any object. At that time *e* the deceased was beside her. He was also not holding anything. As the accused came down he went to approach the deceased and began to stab the deceased several times at the front part of his body. According to PW5 the deceased did not fight back but collapsed instead. And even after he had collapsed the accused further stabbed him on the side. And at that point in time PW5 said *f* that she ran away.

Asked to identify the object used by the accused to stab the deceased, PW5 said that it was exh. P16. She also stated that it could only be found in the upper section of the factory. This witness also identified the grey shirt (exh. *g* P9) and the pair of jeans (exh. P12) as those worn by the accused on that day. As regards the relationship between the accused and the deceased PW5 said that she never saw the two quarrelling before.

In answer to questions from the learned counsel for the accused PW5 said that the deceased did not response when the accused shouted "koyak-koyak". *h* And PW5 also said that the deceased did not do anything except to talk after he was hit by the spoilt veneer torn by the accused. PW5 maintained that the deceased only shouted "kau marah kah" while the accused did not say anything but returned to his place of work.

i

It was put that the deceased uttered foul language to the accused. PW5 replied in the negative. And when this witness was asked how the accused came down prior to the stabbing she said that the accused just jump down from his place of work.

It was also suggested to PW5 that after tearing the spoilt veneer the accused returned to his place of work and then to the back of the machine. Her reply was that she did not see the accused going behind the machine. And it was further put to PW5 that whilst the accused was behind the machine the deceased went up to the accused's place of work and kept shouting foul language to the accused. Her answer was also in the negative. PW5 also denied that the deceased hit the accused on the head.

As regards the object (exh. P16) PW5 in her answers to the questions from the learned counsel for the accused said that such object (which she also described as a knife) could only be found in the work place of the accused where it was affixed to the machine. That such knife could not be found lying around.

And finally in answer to a question during re-examination from the learned deputy PW5 stated that they did not run away when the accused returned to his place of work after tearing the spoilt veneer as nothing was suspected.

The prosecution also introduced a chemist report dated 26 August 1997 under reference No. (KK) FOR 1177/97-0 which was admitted and marked exh. P3. Reproduced herein the relevant portions of exh. P3:

i. Tanda "Exhibit No. : 1" (pada kertas C.I.D. 38)

Saya mendapati di dalam bungkusan plastik tersebut sehelai baju kemeja lengan panjang warna belabu jenama "WATER WORKS" dengan kesan tanah dibahagian belakangnya.

Setelah diperiksa dan dianalisa, saya mendapati ada kesan darah manusia dari kumpulan "O" terlekat pada bahagian hadapan baju kemeja tersebut.

ii. Tanda "Exhibit No. : 2" (pada kertas C.I.D. 38)

Saya mendapati di dalam bungkusan plastik tersebut sehelai seluar panjang warna kebiruan (luntur) jenama "USTOP" yang dipenuhi dengan kesan tanah kering.

Setelah diperiksa dan dianalisa, saya mendapati ada sedikit kesan darah manusia terlekat pada bahagian hadapan sebelah atas seluar tersebut. Memandangkan kesan darah ini terlalu sedikit, maka saya tidak dapat menentukan kumpulannya.

iii. Tanda "Exhibit No. : 3" (pada kertas C.I.D. 38)

Saya mendapati di dalam bungkusan plastik tersebut satu bungkusan kertas tulis warna putih bergaris biru yang mengandungi sebatang besi bersaiz 22.0 cm panjang, 2.5 cm lebar dan 0.7 cm tebal dan mempunyai satu jujung tajam manakala dihujung yang lain terdapat empat (4) lubang yang sama saiz. Besi ini didapati telah berkarat dan terdapat kesan tanah.

Setelah diperiksa dan dianalisa, saya mendapati batang besi yang tersebut di atas bebas dari sebarang kesan darah.

iv. Tanda "Exhibit No. : 4" (pada kertas C.I.D. 38)

Saya mendapati didalam bungkusan plastik tersebut satu lagi bungkusan plastik tanpa warna dimana di dalamnya terdapat satu cebisan kayu berupa kepingan "plywood" yang dipenuhi dengan kesan kotoran kemerahan pada salah satu daripada permukaannya.

Setelah diperiksa dan dianalisa kesan kotoran kemerahan tersebut, saya mendapati ianya merupakan darah manusia dari kumpulan "O".

v. Tanda "Exhibit No. 5" (pada kertas C.I.D. 38)

Saya mendapati di dalam beg plastik jernih tanpa warna satu botol kaca kecil di mana di dalamnya mengandungi spesimen darah cecair.

Setelah dianalisa, saya mendapati spesimen darah cecair tersebut adalah darah manusia dari kumpulan "O".

The above exhibits were marked in this trial as exh. P9, exh. P12, exh. P16, exh. P20 and exh. P23 respectively.

And the chemist who prepared the report was called to testify. PW2 Shaari Hj Desa gave evidence that he is a chemist with the Chemistry Department, Sabah Branch. He said that he is a gazetted chemist under Gazette Notification No. 10563 dated 5 November 1992. He is also a member of the Chemistry Institute of Malaysia. PW2 further gave his academic qualification. He obtained his Bachelor of Science in Chemistry from the Universiti Kebangsaan Malaysia in 1991. He started work with the Chemistry Department Headquarters in Petaling Jaya for five years. Initially he was in the Customs Section. Later he was transferred to the Forensic Section where he received training including serology. Since his posting to the Sabah Branch, PW2 has been heading the Forensic Section which includes the handling of criminal cases. However, this is the first case he has come to court to testify as a chemist.

Nevertheless, having considered his experience and qualification and the fact that the defence raised no objection or adduced evidence to challenge his expertise, there is no reason not to consider PW2 as duly qualified to give his evidence as a chemist and thus an expert. I have no doubt on his expertise and I therefore rule that he is duly qualified to give evidence as a chemist in this trial. (See: *Public Prosecutor v. Lin Lian Chen* [1991] 1 MLJ 316).

In his evidence, PW2 said that he received a package from the police on 24 July 1997. After having duly registered the package, he kept it in the strong room under lock and key. On 5 August 1997 he took out the package to check and to register the number of exhibits in it. Thereafter he kept the package in the metal cabinet in his room under lock and key as well. Then on 19 August 1997 he began to analyse the exhibits. He completed his task on 25 August 1997. His main purpose in conducting the analysis was to look for traces of blood on the exhibits given and to determine the groupings.

Amongst the exhibits submitted to PW2 for analysis were:

(a) a grey shirt (exh. P9);

(b) a pair of jeans (exh. P12);

(c) a piece of iron with sharp tip (exh. P16);

(d) a plywood chip (exh. P20); and

(e) one glass bottle containing blood sample (exh. P23).

And according to PW2, he found traces of human blood in exh. P9 and exh. P20 under group "O". As for the blood sample (exh. P23) PW2 also found it to be human blood under group "O". But he found no traces of blood on the piece of iron (exh. P16) and the rest of the exhibits.

In reply to a question from the learned counsel for the accused, PW2 said that on receipt of the package he had it duly acknowledged receipt. In returning it to the police he also had the evidence of surrender. This witness confirmed that the package produced in court was the same which he received and later on returned to the police.

Several police personnel were also called as witnesses in respect of the arrest and the subsequent finding of exh. P16.

PW10, Lance Corporal 120512 Simon Nyipa A/K Juwet testified that after being informed of the incident on 5 July 1997 at about 4.25pm he and another colleague Lance Corporal Mohd. Nasir went to the scene of the crime. And after getting the description of the suspect they went to look for him. They

saw a person sitting outside the gate of Kilang Senawang with blood stains on his shirt. After identifying themselves as policemen, they asked for the identity of the person. That person identified himself. Thereafter he was arrested and handcuffed. PW10 identified the accused in court as the person they arrested.

This witness went on to say that they brought back the accused to the scene of the incident where ASP Said Noor and other police officers were waiting. On arrival PW10 said that ASP Said Noor directed Insp. Nor Azlan to read the statutory caution to the accused. Having done that PW10 stated that the accused brought him and three others to the place where the object used in the incident was kept. According to PW10 they found the object. And in court PW10 identified exh. P16 as the object which they recovered. This witness also identified in court exh. P9 and exh. P12 as the shirt and the trousers the accused was wearing when arrested. He then identified his Police Report (exh. P28) pertaining to the first information he received on the offence.

Under cross-examination, it was suggested to PW10 that no caution was administered to the accused. He denied. PW10 said that it was a normal practice to read the statutory caution to an arrested person.

The next witness called was PW11, Lance Corporal Mohd. Nasir bin Titi. He said that he went with PW10 to search and effect arrest on the accused. This witness identified the accused in court as the person arrested on 5 July 1997 at 5.05pm. He lodged a police report on the arrest (exh. P29).

The Investigating Officer, Insp. Nor Azlan (PW14) also gave evidence. The relevant aspects of his testimony under this ingredient 3 is that (i) he administered the statutory caution to the accused; (ii) he followed the accused to the place where exh. P16 was found; (iii) he handled all the exhibits collected in connection with this case and sent them for examination; (iv) that he identified the accused in court as the person arrested; (v) that he drew the sketch plan of the scene of the incident; and (vi) he identified exh. P9 and exh. P12 as the clothing worn by the accused when arrested.

This witness also confirmed and tendered the cautioned statement (exh. D1) made by the accused upon being requested by the defence.

And finally the prosecution called PW15, ASP Said Noor bin Mohd. He is the Sandakan District Crime Officer. He confirmed that on 5 July 1997 after 5pm he was at the factory of Capital Veneer and Plywood Sdn. Bhd. to investigate a stabbing incident. He said he was with PW14. When asked to identify, PW15 confirmed the accused as the person arrested on that day.

So much for the evidence adduced by the prosecution for this ingredient 3. At the close of the prosecution case I found that a *prima facie* case has been made out on this ingredient.

(iii) Ingredient 4

For this ingredient the prosecution is relying on the nature and number of injuries caused to the deceased by the accused. The evidence of PW3 as discussed hereinabove described the nature and number of injuries sustained by the deceased. Learned Deputy also submitted that the fact that neither PW4 nor PW5 saw the weapon used when the accused approached the deceased should fortify the assumption that the accused was deliberate in his action of stabbing the deceased. According to the learned deputy the accused must have concealed it or else PW4, PW5 and the deceased would have fled on seeing him coming with the weapon. At the close of the prosecution case I was also satisfied that this ingredient had been *prima facie* proved.

Finding At The End Of Prosecution Case

Having heard the submissions of the learned counsel for the accused and the learned deputy and having considered the evidence adduced by the prosecution, to the extent of undertaking a maximum evaluation thereof, I ruled that a *prima facie* case had been made out and thus called upon the accused to enter on his defence.

The Defence Case

In his defence, the accused opted to give his evidence on oath. He began by relating that on 5 July 1997 at about 4pm he was teaching his friend by the name of Nordin to operate the machine under his charge. Whilst doing so, he saw that the veneer produced was spoilt and could not be used. Thus, he asked PW5 to tear that portion of the veneer. But according to the accused PW5 replied "kaulah yang pergi". This of course varies from the evidence of PW4 and PW5. PW5 said that she replied "nanti dulu". Anyway, the accused said that he went down to tear the spoilt veneer. In doing so the accused said that no one was hit by it. This piece of evidence also differs from what was said by PW4 and PW5. Both testified that the deceased was hit on the face by the spoilt veneer as the accused tore it. Be that as it may, after tearing the accused said that he returned to his place of work to sharpen a knife.

As regards the position of the deceased at that time the accused said that when he went down to tear the spoilt veneer, the deceased was standing next to PW5. However, he said that while he was returning to his place of work the deceased asked him in slightly raised voice: "kau marah kah kepada saya".

According to the accused his reply was: "tidak". That reply said the accused did not prevent the deceased from being angry and wanting to punch him. At that time the accused said that he was then facing the deceased. He claimed that the deceased advanced towards him. That made him retreat while telling the deceased: "sabar kau kawan". And without clarifying the sequence of events, the accused went on to say that at that time he was then coming from his place of work to the deceased's location. He said that he came down twice. The accused further stated that he had also said to the deceased: "saya minta maaflah kalau begitu kawan". Up to that moment the accused said that nothing happened. And he went on to say that he also told the deceased "nantilah selesai bagus-bagus". His explanation for taking such a stand was that at that time he was working.

Thereafter, according to the accused, he returned to his place of work to sharpen the knife that struck a piece of rock embedded in the log. However, he said that the deceased went on to utter foul language to him saying: "pukima, lancau mu lah". But that he said did not bother him and he continued doing his work. At that time the accused said that the deceased was on top of the plywood where veneers would slide to. From there the deceased, according to the accused, went up to his (accused) place of work while he was below sharpening the knife. But that he said did not prevent him from continuing his work. However, from his new location the accused said that the deceased attempted to kick him but missed as he retreated. Consequently, he said that he ran upstairs to the uppermost as that was the only way available to him due to the presence of a log attached to the machine at that time. According to the accused the deceased proceeded to pursue him. So he jumped down to the cement floor. As he jumped down he grabbed an object but did not realise what it was at that time. Meanwhile, he said that the deceased also jumped down to the cement floor and took the liberty to strike him on the back. As he turned to face the deceased the accused said that the former punched him on the chest. It was at that moment he said that he felt he had to defend himself. So after being punched and as the deceased came towards him he proceeded to stab him. He did not realise how many times he stabbed the deceased at that time. After stabbing he returned to his place of work as there was no other way. And then he heard someone shouting at him: "kau lari". He therefore ran towards another factory still holding the object he used to stab the deceased.

When shown exh. P16, the accused identified and confirmed that it was the object he was holding. He also said that he kept exh. P16 at a place by the river bank before proceeding to the Senawang factory.

The accused further said that his purpose of going to Senawang factory was to seek for assistance from the security guard there to call the Police as he wanted to surrender himself in order to avoid difficulties. He waited for quite a while before two policemen came. The accused said that he had to run from the place of incident as he was scared of being beaten up by the relatives of the deceased working in the same factory.

When asked about his relationship with the deceased, the accused said that they never quarreled before. He also said that before the fateful day the deceased never scolded him.

The accused denied that he came down from his place of work and proceeded to stab the deceased.

And finally the accused confirmed that he gave a statement to the Police in the form of exh. D1.

Under cross-examination by the learned deputy the accused agreed that he did not run away from Sabah as his pregnant wife was in the hostel of Capital Veneer and Plywood Sdn. Bhd.

As regards exh. D1 the accused also agreed that when giving it he was in a confused state of mind.

In answer to a question on what would make him angry, the accused said that he would get angry if someone uttered foul language on his family. Otherwise he would not be by those which he claimed to have been uttered by the deceased.

The accused also said that at the time of his arrest he felt pain on his back and chest. But he was not injured.

On his friend Nordin, the accused said that he (Nordin) ran away hurriedly when he went down to tear the spoilt veneer. According to the accused Nordin was probably scared although at that time there was no quarrel yet.

In explaining on how he tore the spoilt veneer, the accused said that he did not throw it away. He left it on top of the plywood since it would be pushed away in any event. The accused also said that at that time he was not angry at all. As such he did not know why the deceased asked him if he was angry with him.

On the use of foul language by the deceased, the accused said that he did not get angry. Instead being a good person he asked for forgiveness.

The accused claimed that the deceased pursued him as he was returning to his place of work after tearing the spoilt veneer. And as regards the alleged kicking by the deceased the accused said that he felt scared and apprehended danger. That prompted him to run upstairs as he thought that was the faster way. The accused also said that before going up he put down the sharpening stone and took exh. P16. He said that exh. P16 was available at the work place and he knew that it had a sharp end.

When shown the photograph of the deceased, the accused confirmed that he was the person he stabbed. But he qualified it by saying that he was not aware or consciously aware when he did the stabbing. The accused further said that he did not know at that time why he took exh. P16. But he said that he did not take any of the wood waste nearby as they were too thin. And the accused claimed that when hitting him the deceased was holding a pipe which he took while on top of the machine. He also alleged that the deceased was holding the pipe when he was chasing him. The learned deputy then pointed out to the accused that earlier on he said that he was punched. In reply, the accused explained that what he meant was that the deceased used the pipe to punch him.

It was also put to the accused that he stabbed the deceased with exh. P16 three times on the chest. His answer was that he could not remember. The accused also disputed that after the deceased had collapsed he proceeded to stab him once. But he admitted to know that stabbings on the chest which hit the heart and lungs would cause death. However, in this case he said that the killing was not intended.

On re-examination the accused explained that he did not run away not only due to his pregnant wife but also to enable him to seek for police protection.

As regards exh. D1, the accused said that the contents were correct when it was read back to him after the recording. And he also went on to explain that Nordin ran away as he was scared of being scolded for the spoilt veneer.

As to the precise moment when he replied the deceased: “saya bukan marah sama kau” the accused said that it was when he was coming down and not while he was sharpening the knife.

His learned counsel went on to ask him on the circumstances prevailing when he took exh. P16. The accused answered, quite contrary to his earlier version, that when he was running up he did not know whether he was holding the sharpening stone or exh. P16. And in the next breath the accused also said that he put down the sharpening stone while not realising that he had picked up exh. P16 thereafter. He only realised it after stabbing the deceased.

In explaining the danger he felt when the deceased allegedly kicked him, the accused said that at that time there was a knife in front of him which he was sharpening.

Finally, the accused denied that in stabbing the deceased he intended to hit his lung and heart.

The defence is also relying on exh. D1 (Cautioned Statement of the Accused). Basically what the accused has said in his statement are quite similar to his evidence in court, namely, the shout to tear the spoilt veneer, the exchange of words with the deceased, the abusive language, his fear of being attacked and the stabbing of the deceased.

Findings At The End Of Whole Case

In his final submissions learned counsel for the accused submitted that "the following facts are not disputed:

(1) that one Isnidal (sic) bin Rasin was killed at the time and place specified in the charge;

(2) that the death was caused by the injuries inflicted by the accused.

(3) that weapon used was P16.

In other words the first three ingredients mentioned above are not disputed by the defence.

However, even without the concessions by the defence I am satisfied beyond reasonable doubt that the prosecution has discharged its burden on those three ingredients. And I find that the defence has not raised any doubt on those items.

Learned counsel for the accused, nevertheless, contended that there is a doubt as to whether "there was in fact such an intention to kill the deceased within s. 300 of the Penal Code." He cited the case of *Tham Kai Yau & Ors v. Public Prosecutor* [1977] 1 MLJ 174 where his Lordship Raja Azlan Shah FJ (as His Highness then was) said at p. 176:

> Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that … the act is likely to cause death.

a Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and … is sufficient in the ordinary b course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

The words which I have italized show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is c always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. **Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder.** Illustration (d) of s. 300, Penal Code is a case of this description. **Where the** d **offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder.** Illustration (b) of s. 300, Penal Code is a good example. The essence of (b) and (3) is this. **It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is** e **sufficient in the ordinary course of nature to cause death.** Illustration (c) given in s. 300, Penal Code is an example. It is on a comparison of these two limbs of s. 299 and s. 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. **In the last analysis, it is a question of degree of probability** (emphasis added).

f A comparison that frequently arises in the application of ss. 299 and 300 is the tenuous contention that s. 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to s. 300 apply, and if by reason of the absence of the necessary degree of *mens rea* an offence does not fall within s. 300, it cannot be one of culpable homicide not amounting to murder punishable under s. 304, g Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. *Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s. 300, Penal Code apply, and (b) where the necessary degree of mens rea specified in s. 299 is present, but not the* h *special degrees of mens rea referred to in s. 300, Penal Code.* We would like in this connection to express the need to bear in mind that all cases falling within s. 300, Penal Code must necessarily fall within s. 299, but all cases falling within s. 299 do not necessarily fall within s. 300. *The first part of s. 304, Penal Code covers cases which by reason of the exceptions are taken* i *out of the purview of s. 300, cls. (1), (2) and (3) but otherwise would fall*

> *within it and also cases which fall within the second part of s. 299, but not within s. 300, cls. (2) and (3). The second part of s. 304, Penal Code covers cases falling within the third part of s. 299 not falling within s. 300, cl.* (4). (emphasis added).

Further down at p. 177, his Lordship continued:

> Speaking generally, if the act must in **all probability cause death,** the offence is within s. 300, Penal Code, and if the act is **only likely to cause death,** the offence falls within s. 299, Penal Code. (emphasis added).

In the light of what were said in *Tham's* case *(supra)* learned counsel for the accused argued that the evidence adduced in this present case do not meet the necessary requirement of intention for murder. He reasoned that the accused would not have been so silly to commit the offence in the presence of PW4 and PW5 if indeed he intended to cause the death of the deceased. Learned counsel also said that there was no dispute that there was a sudden fight. But, with respect, that may be so if the version of the accused is taken wholly as true. However, I shall rule on that point in a little while.

Further, learned counsel also went on to give his own explanation or theory on the positions of the injuries sustained by the deceased. He cited the shorter height of the deceased and his movements during the stabbing. Learned counsel further stated that the accused could not have inflicted with precision the vital organs of the deceased at that time. In fact even the sharpening of a different knife prior to the stabbing was taken by the learned counsel as an indicator that the accused did not plan the killing.

And finally learned counsel submitted that there was no intention to kill "save for the inference due to the weapon used and the injuries inflicted. But these are just inference and must be look *(sic)* at in totality with the surrounding circumstances. There was no grudge between the accused and the deceased."

On the issue of intention, learned deputy for the prosecution, submitted the following points:

(i) that the version of the prosecution, in particular the testimonies of PW4 and PW5 should be accepted as the accurate account of the incident. Learned deputy submitted that there was no question of sudden fight, not even remotely;

(ii) that motive is a relevant fact but its absence should not be a basis to refuse a finding of quilt;

(iii) that the accused's story consists of three versions. However the version given in court removed all possible defences of provocation and unintentional stabbings;

(iv) that the nature and fatalities of the injuries sustained by the deceased gave no excuse to the accused for inflicting as such. The physical built-up of the parties are irrelevant;

(v) that the moments before the stabbing, including the concealment of the weapon used (exh. P16) and the close proximity at the time of stabbing show otherwise than unintentional;

(vi) that by inflicting deep wounds into the chest of the deceased would naturally strike the vital organs; and

(vii) that the accused's reasons for not fleeing were calculated as he had no other option.

Now, as to whether I am satisfied beyond reasonable doubt that there was the necessary intention under s. 300 of the Penal Code should depend on the evidence adduced and the surrounding circumstances at the material time.

To recapitulate, s. 300 of the Penal Code reads:

300. Murder.

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

Secondly – If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly – If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

Fourthly – If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as it likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

ILLUSTRATIONS

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Exception 1 – Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisoes:

Firstly – That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly – That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly – That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation – Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

ILLUSTRATIONS

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Exception 2 – Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

ILLUSTRATION

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Exception 3 – Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of the public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused.

Exception 4 – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation – It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5 – Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death with his own consent.

ILLUSTRATION

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Whereas, Section 299 reads:-

299. Culpable homicide.

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as it likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

ILLUSTRATIONS

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Explanation 1 – A person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

> Explanation 2 – Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.
>
> Explanation 3 – The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

The defence says that the wounds inflicted and the weapon used are only matters upon which inferences may be made. Whilst that may be the case it should also be noted that in drawing an inference two conditions must be complied with, namely: (i) it must account for all the known facts and (ii) it must be the only reasonable inference which will account for all the facts. (See: *Liew Kaling & Ors. v. Public Prosecutor* [1960] 26 MLJ 306). Meanwhile, as regards intention it is something which is incapable of direct proof. It is also not something that can be seen. It is the state of the mind. Hence, to ascertain it the surrounding circumstances have to be considered including the nature of the wounds inflicted, the number of wounds, the part of the victim's body which sustained the injuries and the nature of the weapon used. Indeed in *Tan Buck Tee v. Public Prosecutor* [1961] 27 MLJ 176, his Lordship Thomson CJ took the nature of the injuries sustained by the victim as an indicator of intention when he said this at p. 179:

> There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.

In the instant case there was hardly any dispute on the nature of the wounds sustained by the deceased, the number of wounds and the weapon used. From the evidence of PW3, the left ventricle of the heart and the right lung suffered the fatal blows which would not have allowed life to continue for more than 10 minutes. The deep penetration of the three fatal wounds were the result of substantial force used according to PW3. It was the view of PW3 that such wounds were sufficient in the ordinary course of nature to cause death.

The surrounding circumstances too do not support the contention of the learned counsel for the accused on this issue of intention. Although initially the accused said that he did not know what he was holding during those crucial moments, such stand was demolished by him whilst under cross-examination. He admitted holding exh. P16 at that time and he knew it was sharp at one end. And in re-examination the accused tried to repair the damage done. However, I have no hesitation to accept that he knew what he was holding

moments before the stabbings took place. I find support from the evidence of PW4 and PW5. Both did not see the accused holding exh. P16 as he came down. Obviously it was hidden from their view and probably from the deceased. And I have no reason not to believe PW4 and PW5. I found them to be frank and direct in their answers. Further, there was no reason adduced that they would most likely lie against the accused. There was no grudge between them and the accused.

In my view the bulk of the argument of the learned counsel for the accused is on the absence of any motive for the accused to inflict such fatal injuries on the deceased. But motive is only a relevant fact, not an ingredient necessary to be established to convict a person of an offence; in this case, of murder. It has been said that "it often happens that only the culprit himself knows what moved him to a certain course of action." (See: *Rajinder Kumar & Anor v. State of Punjab* [1966] Cri. LJ 960). Moreover, the accounts of PW4 and PW5 on how the accused executed the stabbings neutralised the urge to determine motive. PW4 and PW5 both gave a clear and similar version of how the accused came down from his place of work, approached the deceased and landed the fatal blows, not one but three on the chest. And both witnesses also said that as the deceased laid on the floor another strike came hitting him on the side. In my judgment such a reaction shows nothing less than to ensure that what was intended would be achieved. The attitude in causing the injuries as well as the injuries caused indicate the probability to cause death as opposed to only likely to cause death. I must say that the accused took a very high degree of risk to a human life, the life of the deceased.

Accordingly, from the evidence adduced and the surrounding circumstances shown, I am satisfied that the prosecution has established beyond reasonable doubt that in inflicting the injuries sustained by the deceased the accused had, in particular, the intention of causing such bodily injuries and such injuries intended were sufficient in the ordinary course of nature to cause death. Hence, the first line of defence of the learned counsel for the accused fails.

Of the exceptions stated in s. 300 of the Penal Code, learned counsel relied on exceptions 2 and 4.

(a) Exception 2

Learned counsel for the accused submitted that exception 2 of s. 300 of Penal Code is applicable in the instant case. At the same time he admitted that the accused no doubt had exercised the defence in excess of power given due to the use of exh. P16 to inflict the injuries upon the deceased. However, learned counsel argued that the killing under such circumstances should only lead to

culpable homicide not amounting to murder if the exercise was done in good faith and under the circumstances stated in the exception. The case of *Teoh Seng Lian v. Public Prosecutor* [1986] 474 was cited.

On the other hand learned Deputy replied that "for private defence to succeed, the accused must be able to cast a reasonable doubt that his repeated stabbings at the heart and lungs of the deceased was done without intention of doing more harm than is necessary for the purpose of such defence". And the learned deputy argued that the accused had nothing to defend against as the deceased was unarmed. Even if he was in danger he had every opportunity to flee. But in this case the learned deputy maintained that the accused was never in any real danger during the whole episode.

In considering whether indeed exception 2 applies the relevant evidence from both sides need to be evaluated. I note that the version of the accused on what transpired just before the stabbings is diametrically opposed to that of PW4 and PW5 who were present before and during the incident. The accused depicted a scenario that the deceased was the aggressor. He said that for no obvious reason the deceased became angry with him, uttering foul language to him, attempted to kick him, chased him while armed with a pipe and subsequently hitting his back with the pipe.

The evidence of PW4 and PW5 show otherwise. Both witnesses said that the deceased was at all times standing next to PW5 prior to the stabbings. They also said that the deceased was hit on the face with the spoilt veneer when the accused tore it. That, according to these witnesses prompted the deceased to ask the accused: "Kau marah kah". To that question these witnesses said that the deceased received no response from the accused. PW4 and PW5 also testified that after asking the accused the deceased did say something else but they could not hear. It was not in dispute that at that time the place was noisy due to the machines and one had to raise the voice in order to be heard. And then a few minutes later PW4 and PW5 said that the accused came down quickly, approached the deceased and proceeded to stab him. From what these witnesses said the deceased would appear to have no chance at all to defend himself, let alone attacking the accused.

Another witness, PW7, Aisah bte. Dullah, testified that she was also working in the factory on that day in the "Roteri" section but in a different area. She said that at 4pm on that day she was resting. She did not hear any quarrel before she went for a rest.

For the exception to apply there must be a *bona fide* exercise of the right of self-defence. Where a person is under an apprehension of injury to himself he has such a right of self-defence. However, the exception is only applicable if the person who caused the death of another in exercising such right had no premeditation and without any intention to kill. Further, if the defence under this exception is to succeed there must, in the first place, be some evidence to support it, either from the evidence adduced by the prosecution or by the defence.

Now, having given the conflicting versions my anxious consideration I am unable to accept the story of the accused and I reject it without any reservation. If indeed there was a quarrel between him and the deceased, surely PW4 and PW5 would not have missed it. And I have no reason to doubt the veracity of the evidence of these two witnesses. Thus, I accept their version of the incident as I find them to be truthful witnesses. After all there was no evidence indicating that they had grudge against the accused. And in any event I find that these witnesses had no reason to lie. I also note that both PW4 and PW5 must have been taken by surprise as they only fled from the scene after the deceased was stabbed.

In view of my foregoing finding the issue of self-defence does not therefore arise. I have no doubt in concluding that exception 2 is not available to the accused in this instant case.

(b) Exception 4

In relying on this exception 4 of s. 300 of the Penal Code learned counsel for the accused also referred to the version which the defence relied upon for exception 2. Learned counsel submitted that the accused did not take undue advantage or acted in a cruel way when he used exh. P16 as it happened to be with him at that time.

The learned deputy disagreed that this exception 4 applies. He submitted that the four stab wounds using a sharp iron with substantial force should indicate a cruel or unusual manner in which the accused acted. Learned deputy further said that the circumstances in the instant case did not justify the accused in acting the way he did.

As I cannot accept the version of the accused on the events prior to the stabbing for the same reasons as discussed when dealing with exception 2 hereinabove, the issue of sudden fight in the heat of passion upon a sudden quarrel does not arise. PW4 and PW5 were very clear on what the deceased was doing just before the stabbings. From their evidence, which I accept, there is no reference to any fight or quarrel. At most they heard the deceased asking

the accused "Kau marah kah" when the former was hit on the face by the spoilt veneer when torn by the latter. And according to PW4 and PW5 the accused did not respond to the question. Even the accused in his evidence did not say that he was angry for being asked. Hence, there is no basis to infer that prior to the stabbings there existed a sudden fight in the heat of passion upon a sudden quarrel.

Further, the manner in which the accused carried out the stabbings whilst the deceased was unarmed failed to pass the second test required under exception 4. Save for the evidence of the accused that the deceased was armed with a pipe at that time but which I reject outright without any hesitation, the testimonies of PW4 and PW5 stated otherwise. As such, in using exh. P16 and proceeding to stab the deceased not once but four times including one when the deceased had already collapsed, obviously reflected a situation where the accused had taken advantage or acted in a cruel or unusual manner.

Accordingly, I find that Exception 4 has no application in the present case. The accused has not even raised any doubt in my mind that this exception 4 may be applicable.

In fact even if provocation is relied upon (which in this case it is not) the evidence of the accused himself negated such possibility. In his evidence the accused said that he was not even angry when foul language was hurled at him. Anyway in this case the evidence of PW4 and PW5 discounted the use of foul language by the deceased. And although they heard the deceased continuing talking after asking the accused, they could not make out what he said. That should be expected as it was not disputed that at that time the place was noisy due to the machines. If PW4 and PW5 could not even hear the deceased who was closer to them, it would be quite obvious that the accused could not have heard exactly what were said as he was at a different level and at one point, he was behind the machine. It should also be noted that due to the noise PW4 and PW5 said that one had to shout in order to be heard. Thus, the shouting by the deceased when asking the accused should not be given any adversed inference on the situation prevailing then. Hence, there is also no doubt in my mind that provocation is out of the question.

Conclusion

Having therefore considered all the evidence adduced in this case as a whole including that of the defence, I am satisfied that the prosecution has proved the charge against the accused beyond all reasonable doubt. In my view all the ingredients of the charge preferred have been proved beyond all reasonable doubt. The defence has not raised any doubt in my mind as to the truth of

the prosecution case. None of the exceptions 2 and 4 relied upon could be of any assistance to the accused. Hence, in my judgment the accused is guilty of the offence as per charge. I therefore convict the accused of murder as charged.